

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELAINE WILDER)	
Claimant)	
VS.)	
)	Docket No. 202,296
SHAWNEE COUNTY)	
Respondent)	
Self-Insured)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin on December 6, 1996, and corrected by a Nunc Pro Tunc Order on December 11, 1996. The Appeals Board heard oral argument May 13, 1997.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared on behalf of the claimant. Larry G. Karns of Topeka, Kansas, appeared on behalf of the respondent, a qualified self-insured. Jeff K. Cooper of Topeka, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board adopts the stipulations stated in the Award. The Appeals Board has reviewed and considered the record identified in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The major dispute concerns the tasks loss component of the test for measuring work disability found in K.S.A. 1993 Supp. 44-510e. Respondent and claimant each ask the Appeals Board to adopt their differing descriptions of the tasks claimant performed in her 15-year work history. The differing descriptions generate substantially different calculations of the tasks loss and work disability. Respondent also argues claimant failed to present a physician's opinion of the tasks loss as required by K.S.A. 44-510e. Claimant also contends the Administrative Law Judge erred in computing the wage loss component of work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent as correctional specialist and a lead correctional specialist for 28 years. Some of her tasks required that she work directly with the residents of the correctional facility. She checked residents in and out of the facility, transported residents to other facilities as needed, directed recreational and educational activities, and performed other similar duties working directly with the residents. Part of the work was done in the vicinity of residents but did not involve working directly with the residents. She prepared and maintained records, for example, and assisted supervisors in coordinating their activities.

On March 2, 1994, claimant injured her back when a resident grabbed her by the shoulder and twisted her. Claimant returned to work for respondent after the injury but in a different job at a wage less than 90 percent of the average gross weekly wage she was earning at the time of the injury. The Appeals Board finds she is entitled to work disability which is measured by the tasks loss and wage loss factors specified in K.S.A. 44-510e:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The central dispute in the case concerns how to define the tasks when calculating the tasks loss component of claimant's work disability. As a part of claimant's work, during the relevant fifteen years, she was required to be able to defend herself and restrain residents. There appears to be no dispute that after the injury claimant could no longer restrain residents or defend herself. While the instances where claimant was actually required to restrain residents were extremely rare, respondent considered the function sufficiently important that claimant was not permitted to return to the pre-injury job. As a result she was moved to her current position in the medical records department at the lower wage.

Claimant contends that the ability to restrain residents is an integral part of most, if not all, of the tasks she performed in the 15-year work history. Since she cannot now restrain residents, she has lost the ability to perform most of these tasks. Based upon expert testimony, claimant contends the tasks loss is between 85 percent and 100 percent. Conversely, respondent contends that the restraint of a resident is a separate single task. When restraint is treated as a separate task, the tasks loss, according to respondent, is only 14 percent. The Administrative Law Judge agreed with claimant's argument and found the tasks loss to be 86 percent.

The Appeals Board also agrees with the position advanced by claimant. Respondent and claimant each offered into evidence a list of tasks prepared by a vocational expert. The list prepared by respondent's expert, Michael Dreiling, separates the ability to restrain residents and treats it as a separate task. The list prepared by claimant's expert, Dick Santner, included that ability to restrain residents as a component of all of the tasks. In his deposition testimony, Mr. Santner agreed that for 2 of the 13 tasks the likelihood of contact with residents was small. In all other cases, the ability to restrain residents was considered an integral part of the task.

Respondent argues that it is inappropriate to tie the definitions of the tasks to the specific task performed by the individual claimant. Respondent also points out that claimant could, after the injury, perform certain of the work in another setting. Claimant could, in fact, perform the tasks in almost any setting other than a correctional facility. Respondent argues the skills are transferable, and the tasks should be separated from the ability to restrain residents.

The Appeals Board concludes that it is appropriate to look at the tasks as specifically performed by the individual claimant. The definition of tasks is not generic or abstract. It is keyed by statute to the tasks performed by the individual. The fact that certain skills remain transferable also does not appear decisive. Prior to the amendments which became effective in July 1993, work disability was measured, in part, by the ability to obtain and retain employment in the open labor market. The statutory tasks loss test calculates the percentage of lost ability to perform tasks claimant had been performing in the 15 years prior to the accident. This test may have some correlation to the ability to work in the future. Here, for example, claimant had changed to a different job. That is not, however, the direct question. The direct question is whether claimant can still do the work she did over the prior 15 years. In this case the answer, for the most part, is no. The ability to restrain the residents was an integral part of most of her tasks.

As indicated, Mr. Santner, claimant's expert, identified 13 tasks. He agrees two of these were tasks that did not necessarily require the ability to restrain the residents. The remaining 11 did. Mr. Santner's definition of the tasks is supported by testimony of claimant and coworkers familiar with the job. Using this task list, and eliminating those tasks where restraints may be required, reflects an 85 percent loss of ability to perform tasks.

Respondent next argues that the 85 percent tasks loss is not stated in the opinion of the physician as required by K.S.A. 44-510e. The record shows that Sharon L. McKinney,

D.O., testified claimant could not perform any of the listed tasks which would require the ability to restrain residents. The Board does not consider it necessary for the physician to do the math if he or she has expressed a medical opinion regarding which tasks cannot be performed. The Board finds the opinions expressed in this case by Dr. McKinney satisfy the requirements for a physician's opinion found in K.S.A. 44-510e.

The Appeals Board also concludes there should be an adjustment in the wage loss factor. The Special Administrative Law Judge found a 22 percent wage loss based on a comparison between the preinjury hourly wage of \$12.94 and the post-injury hourly wage of \$10.05. He did not use the average weekly wage as specified in K.S.A. 44-510e. The parties have stipulated to an average weekly wage of \$565.33 on the date of accident. The evidence shows claimant would not be working overtime in the post-injury job and her average weekly wage, post-injury, is \$402. Comparing the two average weekly wages shows a 29 percent loss which the Appeals Board finds to be the loss for purposes of calculating work disability.

The Appeals Board, therefore, finds and concludes that claimant has a 29 percent wage loss and has an 85 percent tasks loss. Averaged together those components result in a 57 percent work disability. The record also shows claimant has a preexisting 10 percent functional impairment which should be deducted in accordance with K.S.A. 1993 Supp. 44-501. Claimant is entitled benefits based upon a 47 percent work disability.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Special Administrative Law Judge Douglas F. Martin, dated December 6, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Elaine Wilder, and against the respondent, Shawnee County, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred March 2, 1994, and based upon an average weekly wage of \$565.33 for 34.82 weeks of temporary total disability compensation at the rate of \$313 per week or \$10,898.66, followed by 185.73 weeks of permanent partial compensation at \$313 per week or \$58,133.49 for a 47% permanent partial work disability, making a total award of \$69,032.15.

As of June 30, 1997, there is due and owing claimant 34.82 weeks of temporary total disability compensation at the rate of \$313 per week or \$10,898.66, followed by 138.89 weeks of permanent partial compensation at the rate of \$313 per week in the sum of \$43,472.57 for a total of \$54,371.23, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$14,660.92 is to be paid for 46.84 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all of the Orders by the Administrative Law Judge relating to future medical expenses, fees and expenses of administration.

As reflected in the December 11, 1996 Order Nunc Pro Tunc, 50% of the total benefit awarded, including 50% of all fees and expenses, will be paid by the Kansas Workers Compensation Fund and 50% will be the responsibility of respondent and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. The significant dispute in this matter centers on whether claimant's ability to restrain residents was an individual task or a component or element of several tasks. By concluding that this ability to restrain residents is a component of most of the tasks performed by claimant over the previous 15 years, the Appeals Board has increased the tasks loss element of K.S.A. 44-510e from 14 percent to 85 percent. It is difficult to comprehend how an individual element can have such a dramatic effect on a claimant's work disability when, during the two to three years prior to the incident in question, claimant was required to restrain a resident on only one occasion. This Board member would consider the ability to restrain as a separate task and would adopt the tasks loss analysis of Michael Dreiling over that of Richard Santner in finding claimant to have suffered a 14 percent loss of ability to perform job tasks.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Larry G. Karns, Topeka, KS
Jeff K. Cooper, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director